No. 2459

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD. (a corporation),

Appellant,

vs.

PACIFIC CREOSOTING COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

E. B. McCLANAHAN,
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Proctors for Appellant.

Filed this.....day of October, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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BRIEF FOR APPELLANT.

This is an appeal from a judgment of the District Court for the Western District of Washington awarding to appellee $1197.20, with interest (Record, 318), as the full amount claimed (Id. 6) as a partial loss under a marine insurance policy indemnifying against *total loss only,* except the ship be *"stranded, sunk or on fire * * *"* (Id. 9). The policy covers a cargo of iron drums containing creosote shipped on the British ship "Sardhana" from London to Eagle Harbor, Puget Sound, Washington.

The *"memorandum"* clause in the printed body of the policy contains the usual expression *"stranded, sunk or burnt"* (Id. 11), but a printed slip, attached to the margin of the policy, contains *(inter alia):* "War-

*ranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire * * *''* (Original, Libelant's Exh. "A". See also Record, 8 and 9).

The contract dated June 2d, 1908, is that of an English insurance company executed in England, and covers goods which had then been shipped in an English bottom. The vessel sailed from London May 30th, 1908 (Record, 13), and arrived and anchored off the assured's dock at Eagle Harbor November 9th, 1908 (Id. 17), where it was then discovered that some of the creosote containers, or drums, had been dented or damaged by reason of storms encountered on the voyage. After a partial discharge and delivery to the assured, and on November 18th (Id. 17), without damage to the undischarged cargo, a night fire of mysterious origin broke out on the ship in the vicinity of the bulkhead separating the after 'tween decks from the lazarette; and though the vessel had at the time completed her voyage, without any liability attaching to the insurer, nevertheless it is claimed that now, a fire having appeared some nine days after the ship's safe arrival, and after the assured had taken into its warehouse part, and was engaged in discharging and receiving the balance, of the cargo; the particular average warranty of the policy is deleted, and an obligation is thereby created to pay for a prior partial loss caused by sea perils, for which there was insurance against total loss only. If, as we shall show, the *"fire"* was a trivial one,—it is apparent that the claim

is purely technical, and arises under circumstances tempting, at least, to fraudulent imposition, with chances of discovery by the insurer reduced to a minimum.

Furthermore, a claim is made for the loss of four creosote drums with their contents, and salvage expenses, resulting from the subsequent capsizing at night of a completely loaded, but unattended, barge, left moored by the assured alongside the vessel, and furnished and used by it (Id. 69) in lightering the cargo from the vessel to the dock.

Furthermore, although the "Sardhana" was tight, staunch and strong, and in every respect seaworthy for the voyage, *and did not leak,* the appellee's claim includes damages for *a short delivery* by the ship of 56267.2 gallons of creosote (Id. 5),—this latter claim being based upon the difference between the number of gallons of creosote the damaged and leaking drums were assumed to contain at the time of shipment, and the number of gallons claimed to be shown by the assured's ex parte measurement of the drums' contents, *long after delivery.* Instead of attempting to enforce this latter claim against the ship itself, and at the time of discharge, when the facts would have been fresh in mind, the assured remains silent and inactive, allows the vessel to depart *without notice* of any such claim (Id. 119; 124), and then, nearly two years after, proceeds to enforce it against a foreign insurance company which had no control over the "Sardhana", or her world-wide scattered officers and

crew, *the only possible witnesses* having knowledge of the facts necessary to refute a short delivery claim.

The foregoing uncontrovertible facts are thus stated that the court may, in some measure, view this litigation from the insurer's perspective, and thereby gain an appreciation of its motive in carrying to final determination this controversy, even at a cost so large that it would have been a financial saving to have settled the claim without protest. It is not improper to assume that reputable insurance companies gladly pay their just obligations, and often, as a matter of business policy, pay claims which might be successfully resisted on technical but legal grounds; there are circumstances, however, where continued quiescence ceases to be a virtue, and such the insurer feels to be the nature of the claims made at bar.

Assignment of Errors.

These are to be found at pp. 334 to 336 of the record, and we do not deem it expedient to set them forth here, for the reason that our contentions fully disclose what they are and we seek, therefore, to avoid an unnecessary enumeration.

Appellant's Contentions.

As to Damages Claimed for Damaged Drums and Short Delivery of Creosote:

I.

In legal construction a ship must be *on fire as a whole* to delete the F. P. A. warranty.

II.

Under the facts shown in this case, the "Sardhana" was not *on fire* within the meaning of the F. P. A. warranty of the policy.

As to Damages Claimed for the Four Drums Lost From the Lighter, and Salvage Expenses:

III.

This claim cannot prevail because (a) the lighter in question was furnished by the assured and was unseaworthy, and (b) the assured was negligent in leaving it over night alongside the vessel fully loaded and unattended.

As to Damages Claimed for Short Delivery of Creosote:

IV.

The assured cannot recover, even if the ship was legally *"on fire"*, because it has proven no damages.

(a) It has not shown that any creosote was lost;

(b) If any creosote was lost, it was not on board the ship at the time of the fire, and hence the F. P. A. warranty is inapplicable;

(c) It has not shown how much creosote was lost because of perils insured against, it appearing that many of the containers were defective when shipped.

The burden to show the quantum of loss caused by perils insured against has not been even attempted by the assured.

As to Damages Claimed for Damaged Drums:

V.

The assured has not even attempted to prove the number of these which were on the ship at the time of the fire, nor the number which were defective and leaking before the vessel encountered any of the perils insured against.

I.

Argument.

IN LEGAL CONSTRUCTION A SHIP MUST BE ON FIRE AS A WHOLE TO DELETE THE F. P. A. WARRANTY.

The history of this clause is briefly but accurately stated in Gow's work on Marine Insurance (3 Ed., pp. 183-187). There it will be found that the clause originally read: *"Warranted free from average, unless general, or the ship be stranded."* It is not, however, any mere touching of the ground that is held to be a stranding, but a substantial grounding of the ship lasting for an appreciable period (Id. 174-175). Later the words *"sunk or burnt"* were added to the clause, and these words were construed in *pari materia* with the word *"stranded"*, and together with it. This is the view taken by both Barnes, J., in the trial court, and by the court of appeal, in construing the word *"burnt"* in the case of *The Glenlivet,* 7 Asp. Mar. Cas. (N. S.) 395. In that case (which, by stipulation, this court may take judicial notice of, as stating the law of England under the facts there presented, Record, 246),

there were four separate fires in the ship's coal bunkers, involving also damage to the ship's plating, brick and wood casing and hatches. We quote the following extracts from the opinion of Barnes, J., in the lower court, holding that the ship was not "*burnt*" within the meaning of the exception:

> "The memorandum itself was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear, and the original exception of stranding tends to show that this was the scope of the memorandum. The framers had probably in view a casualty of so serious a nature as to be akin to wreck —that is, such a loss as makes it probable that the damage, though under the given percentage, might reasonably be attributed thereto and not to the perishable nature of the subject matter of the insurance. * * *
>
> "There have been a large number of decisions upon the word 'stranding', and in these various definitions of the word may be found, but, in my opinion, there runs through them all, in a greater or less degree, the idea which was probably present to the minds of the framers of the memorandum of a serious casualty to the ship affecting her safety and navigation, even though, as a matter of fact, the amount of damage sustained is unimportant. * * * From the collocation of the words 'sunk or burnt' with the word 'stranded' and from the primary impression produced by reading these words 'sunk or burnt', it is natural and reasonable to construe them upon the principle applied, and with the idea prevailing in arriving at the proper meaning of the word 'stranded'. * * * There are no decisions upon the word 'burnt' in the memorandum in the policy, and it is a remarkable fact if, as Mr. Aspinall contended, the momentary setting fire to any part

of a vessel—such, for instance, as cabin curtains or fittings—is enough to cause the vessel to be a 'burnt' ship, and thereby destroy the warranty, that the present contention has never been brought before the courts since the introduction of the words 'sunk or burnt', though one would think that slight damage by fire was not infrequent on vessels, especially large passenger vessels. * * * I cannot bring myself to think that it would be a reasonable or businesslike construction of the word 'burnt' to hold that the ship is burnt if any part of her or her stores or fittings is slightly injured by fire, whether that fire is one which exhausts itself without danger to the vessel, or, as was also suggested by the plaintiffs, is one which unless promptly extinguished would cause danger to the vessel. In my opinion the more reasonable and businesslike construction is that the ship is 'burnt' whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is pro tempore incapable of being properly used for the purposes of her voyage. This may be expressed by the term 'temporarily unnavigable'. In the present case, on the first voyage, the coals heated slightly, and water being poured on them, whatever fire existed was extinguished. Even assuming that coals are to be treated as included in the word 'ship', which the plaintiffs alleged and the defendants did not deny, there was no interruption of the voyage, nor any interference in any way with the safety or navigation of the vessel. On the second and fourth voyages the heating of the coals caused some damage to the structure of the vessel, but again, there was no interruption of the voyage, or any interference with the vessel's safety or navigation. I am of opinion that upon none of the voyages was the ship burnt within the meaning of the policy, and that the defendants are entitled to judgment with costs."

7 Asp. 342, 343, 344.

The case went to the Court of Appeal and there the respective judges went even further than Barnes, J., in their holdings as to when a ship is *"burnt"*.

Lindley, L. J., says:

> "Now, the facts so far as they are material, are not in dispute at all. There was a fire on board this ship in one of the coal bunkers, and the fire was so severe that some damage was done to the structure of the ship; it is unnecessary to particularize it, but a plate got cracked and some angle irons got burnt. The ship was an iron ship; how much wood was on board I do not know, but it is sufficient to say that the fire clearly injured the ship. Now comes the question whether this ship was 'burnt' within the meaning of that expression. Barnes, J., has held not, and, in my opinion, that is obviously right. I say 'obviously', because we must look at this word 'burnt' in reference to the context, it is part of a phrase 'unless the ship is stranded, sunk or burnt'. What does that mean? I take it the context shows that what is meant is that the ship as a whole must be stranded, sunk, or burnt, and I cannot accept Mr. Aspinall's construction or suggestion that any fire on board a ship, doing a little structural damage to the ship itself, is a burning in ordinary language. It appears to me it is not so."
>
> (Id., p. 395.)

Smith, L. J., says:

> "Now I come to the suggestion of Mr. Aspinall, that it means the initiation of such a fire that, unless it were put out, it would consume the ship. I cannot think that can be the meaning of this, for there never could be a fire which, if not put out, might not consume a ship. If the cabin curtain caught fire and was not put out, that might end in the destruction of the ship. Therefore,

that will not do. Then I come to the suggestion of my brother Barnes, which is, that it must be a burning such as to render the ship temporarily unnavigable. I do not think that is right, if I may say so, because, supposing there was such a burning as only to stop the ship half an hour—suppose a ship was steered by rudder-cords instead of by chains; suppose the rudder-band was burnt, and stopped the ship for half an hour—would you call that a burnt ship? I should not; but that would come within my brother Barnes's definition if she was temporarily unnavigable whilst the rudder-band was being adjusted. I do not think that is right. My own view is you would have to tell the jury what I have already said about partial burning (that the other was not the correct direction), and then you would have to tell the jury that a partial burning may, under some circumstances constitute a burning ship, and may not under other circumstances, and having given that direction you would have to ask them: Has the fire been such as to bring the ship to such a condition that you consider the ship a burnt ship? Then the jury would decide whether the facts brought it up to what you had laid down as the question for them to decide. I think my brother Barnes put too narrow a construction upon the words 'burnt ship', but otherwise I agree with his judgment."

(Id., p. 396.)

It is clear from these opinions that a mere injury to the ship by fire does not constitute a *"burning"*, but that *"the ship as a whole must be stranded, sunk or burnt"* to bring it within the warranty, and that the words *"sunk or burnt"* must be used in collocation with the word *"stranded"*.

In the case at bar the words used in the policy are *"on fire"* and not *"burnt"*. We submit, however, that the clauses are substantially the same, for in either case the words must be construed in collocation with the words *"stranded"* and *"sunk"*, *"the ship as a whole must be stranded, sunk or (on fire)"*. On this subject we quote frankly from Mr. Gow's work at page 181:

> "The judgment in the Glenlivet has excited considerable attention, as it takes away on principle what was long granted without question. But indeed it is not easy to see why a fire in a ship's bunkers or cabin should be enough to establish a claim for damage to cargo arising from some other peril barred by the memorandum, when a touch-and-go graze on a rock, even if actually causing damage, is not enough. Since the issue of the decision some slips have had the words 'on fire' added to 'burnt', confessedly in the hope and expectation of thus restoring to the assured what has been taken from him by the decision."

In a note to this passage the learned author further says:

> "But will not exactly the same principle that was applied in the interpretation of 'burnt' be applied to that of 'on fire'? For it is not a question of the extent of the effect of ignition; if ignition results in the total loss of the property insured, then the loss is claimable as a total loss and not under the memorandum or any other clause referring to partial loss; if it does not result in a total loss, then, as far as the memorandum is concerned, is it not all the same whether you say 'burnt' or 'on fire' so long as the principle of 'substantial burning of the ship as a whole' is applicable? This is the principle stated by Lord Justice Lindley in the Glenlivet decision, Court of

> Appeal, 1894, 1 Q. B. D. 48: 'I take it the context shows what is meant is that the ship as a whole must be stranded, sunk or burnt; and I cannot accept the suggestion of the plaintiff's counsel that any fire on board a ship doing little structural damage to the ship itself is a burning in ordinary language. * * * Of course, in one sense it is burnt; anything that burns any part of a ship is a burning of the ship, but I cannot think that that is the meaning of it here.' ''

Opposing counsel takes the position that *any* burning of the *ship itself* constitutes the ship a *''burnt''* ship, and in the lower court they referred to Mr. Gow as laying down that rule and to a certain opinion by Mr. Walton and Mr. Barnes given *before* the Glenlivet case was decided. They also contended that such was the understanding of the contracting parties. That may have been true before the decision in the Glenlivet case; it certainly is not true now, and Mr. Gow recognizes this when he says:

> ''As it was decided by Lord Ellenborough that a mere touching of the ground was not sufficient to make a strand, so it is now decided in the Glenlivet case that a mere burning is not sufficient to take the exception out of the memorandum; it must be such a burning as to constitute a substantial burning of the ship as a whole.''
>
> (Id., 181.)

In view, therefore, of the Glenlivet case, it is clearly the English law that it is insufficient to show that *''a part of the fabric of the ship''* was on fire, there must be a substantial burning of the ship *as a whole;* not, of course, that the ship must be on fire in every

part, but simply that the fire must be such as to enable the court to say that the ship *as a whole* was on fire. Such must now be held to be the understanding of parties to policies in which the word *"burnt"* is used, whatever the understanding may have been before the Glenlivet decision.

Let us now refer to the contention that in the substitution of the words *"on fire"* for the word *"burnt"* the law of the Glenlivet case is avoided. Conceding, for the purpose of this argument, that this substitution was made at the instance of the assured in the hope of getting back what had been taken away by the Glenlivet decision, the substituted words do not accomplish the result hoped for, for, if the ship *as a whole* must be *"burnt"*, obviously the ship *as a whole* must be *"on fire"*. We say obviously, for we believe that this court, in construing this English policy, will follow the principle laid down by the English courts, and hold that *"there must be a substantial burning of the ship as a whole"* in order to delete the F. P. A. warranty of the contract sued on.

The Glenlivet case was cited with approval in *London Assurance v. Companhie de Moagens do Barreiro*, 167 U. S. 149; 156, 157, and in the same case in the lower court, where the F. P. A. warranty was construed, the court says, quoting from an opinion by Mr. Justice Gray:

> "A diversity in the law, as administered on the two sides of the Atlantic, concerning the interpre-

tation and effect of commercial contracts of this kind, is greatly to be deprecated."

*(68 Fed., at p. 250.)

Undoubtedly this court will be asked by the appellee to ignore the principle of the Glenlivet case, and apply instead the rule that a doubtful intention appearing in an insurance policy must be resolved in favor of the assured, on the theory that all contracts of indemnity are to be liberally construed to that end. While we recognize this general rule, we submit that it is subject to another specifically applicable to the facts of the case at bar, namely: That words of *exception* in a policy, if doubtful, are to be construed most strongly against the party *for whose benefit they are intended.* This latter rule of construction is recognized but applied *against* the assured by the trial court on a superficial conception of the facts. While it may be admitted, as held by the court, that ordinarily the F. P. A. warranty is an exception to the underwriters' liability, and in its interpretation must be read most strongly against him in cases of doubt as to its meaning, still, in the case at bar, it is obvious that the contention and *necessary* argument of the appellee, if it is to avoid the principle of the Glenlivet case, is that the *original* clause in favor of the underwriter, by way of exception to liability, is changed by the substitution of words intended to

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*Note. By the average statement shown at p. 26 of the printed record, the court will see that the two larger policies covering the "Sardhana's" cargo were underwritten at Lloyds, and it will not be denied that at this time suit has been brought in the English courts on these Lloyd policies. It is to be hoped, therefore, that irrespective of how these cases may be decided by the respective courts, there will be no diversity in the construction of the "on fire" clause of the policies.

increase his liability. In the Glenlivet case, the courts gave to the word "*burnt*" a meaning and scope unfavorable to the contention of the assured, and the assured in the case at bar, charged with knowledge of this construction, attempts to so change the clause as to *enlarge* the liability of the underwriter, and the protection of the assured, over that laid down by the court, by having the words "*on fire*" substituted for the word "*burnt*".

We submit, therefore, that under such circumstances, in construing the substituted words of exception, the rule, in case of doubt as to the meaning, should be applied against the assured, and not in his favor, as was done by the trial court.

> *Canton Ins. Office v. Woodside,* 90 Fed. 301, 306, citing:
>
> *Palmer v. Ins. Co.,* Fed. Cas. No. 10698;
>
> *Donnell v. Ins. Co.,* Fed. Cas. No. 3987;
>
> *Yeaton v. Fry,* 5 Cranch 335.

In the Palmer case, the head note reads:

> "Words of exception in any instrument are to be construed most strongly against the party for whose benefit they are intended, and this rule is applied to words of exception in policies of insurance."

While the substituted words "*on fire*", when inserted in the clause, become the words of the underwriter and binding on him, still, as they are shown in this case to have been substituted at the instance of the assured, and for his benefit, we submit that, if in their use there be ambiguity, the rule of construction, admittedly

against the underwriter when applied to the exceptive clause as a whole, should when applied to the *substituted words,* be against the assured. We can see no logical reason why, even in the construction of a policy of marine insurance, the rule as to exceptions should not be applied *against* the assured, if it be clear that the exceptive words were intended for his benefit.

> Q. Now, will you please tell me, Mr. Beckett, who does that placing on the margin of the policy of the memorandum that you find there? As a rule, does not the broker place it there?
>
> A. The broker or the company.
>
> Q. If that was placed there by the company, their printed forms have *"burnt"* in the body of the policy, don't you think they would still place on the memorandum pasted on the side a clause that was harmonious with the body of the policy?
>
> A. No, sir, because the assured would not accept it.
>
> Q. The assured would not accept it?
>
> A. No, sir.
>
> * * * * *
>
> Q. Well, it is against the interest of the company, is it not, to use the expression "on fire" rather than "burnt", since the decision in the Glenlivet case?
>
> A. Yes, sir.
>
> Q. Can you explain how, then, a company would in the body of their policy use the expression "burnt", and then on that printed pasted slip use the expression "on fire"?
>
> A. The printing in the body of the policy is an old form. If the assured wants better risks that are not covered in the body of the policy, they are given him by attaching the slip.
>
> (Beckett Record, 232, 233.)

Q. * * * You said that the assured was the man that wanted better protection was the reason the expression was changed. * * *

* * * * * *

A. It is common knowledge that it is the assured that wants it, not the company. * * *

(Id., 238, 239.)

In the Glenlivet case, the trial court construed the exception in favor of the insurer despite the fact that it recognized it as *"framed to protect the underwriter"*, and was, therefore, an exception in his favor. If, therefore, it be clear that the substituted words in the policy in suit were hoped by the assured to enlarge the insurer's liability, and his protection,—if there be ambiguity in the substituted words, why does not the rule and the equities call for a strict construction against the *assured?*

We pass now to an examination of the facts relative to the extent of the fire in the case at bar.

II.

UNDER THE FACTS SHOWN IN THIS CASE, THE "SARDHANA" WAS NOT "ON FIRE" WITHIN THE MEANING OF THE F. P. A. WARRANTY OF THE POLICY.

Eliminating from the record all matter of undue excitement and properly disregarding the precautionary measures naturally taken upon the outbreak of a fire on board a vessel laden with a cargo as inflammable as creosote (Record, 80; 305), there is left, as shown by a preponderance of disinterested evidence, the single

fact that the fire consisted solely of a partial burning, or *"charring"*, as some of the witnesses termed it, of a sliding battened door forming part of the bulkhead separating the ship's storeroom from the 'tween deck cargo space (Baird, 268; Preece, 283, 284; Yeaton, 297, 298),—a fire so trivial that, when subsequently viewed dispassionately by the man most interested in knowing and determining the damage wrought, it was considered unworthy even of reporting to his principal.

Q. What was your occupation in November, 1908?

A. I was marine superintendent in Seattle for Andrew Weir & Co.

Q. Who was the owner at that time of the bark Sardhana?

A. Andrew Weir & Co.

(Baird, 262.)

Q. Do you remember, captain, the fact of a fire having broken out on the Sardhana at that time?

A. Yes, sir.

Q. Did you at any time after the fire have occasion to see it?

A. The captain come over here and reported to me there had been a fire on board; I went to Eagle Harbor the next day with him.

Q. What for?

A. To see if any damage had been done to the ship.

Q. What did you find?

A. I found there was no damage that required repairing.

Q. What was it exactly that you found?

A. I found that the fire apparently had taken place at the outside of the *lazaret* door, and the door was scorched, and the underside of the deck above it was smoke stained.

Q. Was the ceiling above burned at all?
A. The underside of the deck?
Q. Yes.
A. No.
Q. Was the floor of the upward deck burned at all?
A. No.
Q. Was the bulkhead, aside from the door, burned?
A. No.
Q. Did you make an examination to ascertain that fact?
A. I did.
Q. Have you seen the door recently?
A. Yes, sir.
Q. State whether or not the door as you saw it did or did not represent the extent of the fire?
A. That represented the extent of it.

(Id., 267, 268.)

Q. What business had you in connection with the investigation of this fire?
A. Well, it was my business to see that the vessel was—if she was damaged, to see that she was repaired, to report to the underwriters of the vessel and have it repaired.
Q. Did you make any such report?
A. No.
Q. Did you make a report of any kind?
A. No.
Q. Why not?
A. Nothing to report of any importance.

(Id., 269.)

This, we properly assume, to be the testimony of an impartial witness, entirely disinterested in the outcome of this case, but who was vitally concerned at the time in the question of the extent of this fire. As illustrative, however, of the eager concern of the

appellee to establish a case of more than a trivial fire, we here add to Capt. Baird's testimony on the subject of repairs some further disinterested evidence, which we will then parallel with appellee's sworn statement on the subject.

Capt. Wallace of the "Sardhana", testifying in New York, says:

> 11th Interrogatory (Record, 98). Were any repairs made to your ship on account of said fire?
> A. (Record, 115). No, absolutely none at all.
> 12th Interrogatory. Were any repairs made necessary thereby?
> A. No.
> 13th Interrogatory. If your answer to the 11th interrogatory is that no repairs were made on account of said fire, state if you know what would have been the approximate cost of such repairs if they had been made?
> A. The only repairs that could have been done to the door was to give it a coat of new paint, and that would have been done in any case; I would say that there was no cost at all. The door would have been painted in any case, whether it had been burnt or not.

(See also answer to 22d Interrogatory, Record 100, 117.)

Capt. Wylie, the first officer of the "Sardhana", testifying in London, says:

> 11th Interrogatory. Were any repairs made to your ship on account of said fire?
> Answer. No.
> 12th Interrogatory. Were any repairs made necessary thereby?
> Answer. No.
> 13th Interrogatory. If your answer to the 11th Interrogatory is that no repairs were made on

account of said fire, state, if you know, what would have been the approximate cost of such repairs if they had been made.

Answer. All the repairs that were rendered necessary were simply a rub with a paint brush; the approximate cost would be 1d or 2d—the cost of a brush full of paint.

(Record, 142.)

C. R. Yeaton, second officer of the British steamer "Oteric" (which, by chance, arrived in Seattle at the time of the hearing of this case), who was an apprentice on the "Sardhana" on the voyage in question, and remained on the bark for about two years thereafter, testifies before a commissioner:

Q. Were there any repairs ever made to the fire damage?

A. None.

Q. Were any repairs ever needed?

A. Well, I should say no, because if there had been any they would have had them done to save the ship's stores.

Q. This door protected the stores from pilferage?

A. Yes, sir.

(Record, 298.)

Q. When you left her (the Sardhana, two years after) there had been no repairs made to the fire damage?

A. None.

(Id., 299.)

We will now parallel the foregoing testimony, with the sworn statement of appellee, referring to this matter of repairs, as the same is found in the interrogatory

annexed to appellant's answer and appellee's reply thereto:

> 6th Interrogatory. Was the damage caused by said fire such as to require any repairs, and, if so, state what they were, who made the repairs and the cost thereof.
>
> (Record, 31.)

> To the sixth interrogatory libelant says: That the damage caused by said fire to the said ship, was such as to require repairs; that such repairs consisted of *removing the burned bulkhead and building a new one in its place. These repairs were made by the ship's carpenter.* Libelant is unable to state the cost of such repairs. (Italics ours.)
>
> (Record, 32.)

The unqualified oath, under which this deliberately considered and written statement is made, is given a more remarkable color in view of an entire absence of even an attempt to substantiate it. Furthermore, on *cross-examination* by the appellant, the officer of the appellee who made this statement, and swore to its truth, says that he got his information from Mr. Frank Walker, appellee's surveyor, and from Mr. F. D. Beal, appellee's superintendent (Stevens, 177). Here, however, is Mr. Walker's testimony on this point, also brought out on *cross-examination:*

> Q. Now going back to these questions again (the interrogatories attached to appellant's answer). We asked them (the appellee) whether the damage caused by the fire was such as needed repairing, such as required repairing, and their reply was that the damage was such as it required repairs, and that the repairs were made and consisted of remov-

ing the burned bulkhead and building a new one in its place. Did you furnish them with that information?

A. No. I had nothing to do with that.

(Record, 204.)

Superintendent Beal, on *cross-examination,* testifies:

Q. We asked them if any repairs were made to the ship and they said, yes, the bulkhead was replaced by a new one; did you furnish that information?

A. No, I don't remember of furnishing that information.

(Record, 89.)

In the face of a record such as this, we reach the unpleasant conclusion that appellee, after deliberate consideration, has permitted a misstatement of a very material matter. The company against which this suit is brought has no control of the "Sardhana"; the suit was not brought when the evidence was easily available to establish the material facts. Appellee borrows the ship's log, copies the entry as to the fire into a protest prepared for the master to sign (Record, 121; 160), hires a surveyor to look at the place of the fire, surveys the capsized lighter, ascertains the claimed amount of creosote short delivered, and then, a year and eight months from the date of the fire, when the "Sardhana" is in distant seas, and her officers and crew scattered, brings this suit. Perhaps the circumstances made it safe to concoct, out of whole cloth, this repair story in the belief of appellant's inability to disprove it. The program failed, however, for although forced to seek

far, appellant not only proves by the ship's officers the falsity of the statement, but concludes the refutation by securing, from out the ship, the *unrepaired* door and bringing it, in the condition it has remained since the fire (Yeaton, 299), thousands of miles to the scene of trial. And not only this, but during the hearing before the commissioner, a ship from foreign shores sails into the jurisdiction of the trial court, bringing one of the "Sardhana's" scattered crew, who appears and testifies in the case (Record, 292). The undoing of appellee on this point is thoroughly accomplished, though at considerable expense, and we believe that the recklessness shown in the attempt to make good this very material matter, casts a doubt on its entire proof, which this court will find it difficult to ignore.

Returning now to our presentation of the evidence of the fire's extent, we call the court's attention to the further testimony of Captains Wallace and Wylie. As has been stated, the former's deposition was taken in New York and the latter's in London. Both of these men remained with the "Sardhana" until May, 1911 (Wallace, 114; Wylie, 140), and both were disinterested observers of the extent of the fire from its inception until this latter date. Capt. Wallace says:

> The nature of the fire—as regards the nature of the fire, I would say it was a very trifling affair; the damage to the ship was practically nothing. The lazarette door was slightly charred and blistered, a very small part of it. As far as I can remember, there were only about two feet or 2½ feet of it from the bottom of the door up that was blackened by the fire and a little bit charred.
>
> * * * * * * *

> The fire was put out in about three minutes; not more than five minutes, anyway, by about half a dozen buckets of water being thrown on it.
>
> (Record, 114, 115.)

Captain Wylie says:

> The extent of the fire was very slight; no part of the ship was damaged to any extent. The parts were, the door of the lazarette bulkhead was affected by the fire, that is, it was scorched and a small portion was slightly more than scorched, perhaps, slightly charred by the flames. There was no damage to the bulkhead bar, a very slight blistering of a small portion of the paint.
>
> * * * * * * *
>
> The means used (to extinguish the fire) were half a dozen buckets of water; the time was less than five minutes.
>
> (Record, 141.)

We cannot too strongly emphasize the value of this testimony, coming as it does from disinterested parties who actually saw the fire, and participated in its extinguishment, and who, because of their relation to the owner, would have been derelict in duty to have passed unnoticed a material damage to the ship. There is much in the pleadings and in the record about the dense smoke, the bucket line, the ringing of bells and other excitement; but we have here the word of men whose duty and interest called for the truth, and who were on the spot, saw the fire and did the work necessary for its extinguishment. No doubt there was excitement, no doubt unnecessary water was passed down into the lazarette after the fire was out, no doubt fire extinguishers were used, but both Wallace and Wylie say

that, *in the work of actually extinguishing the fire, there was no outside assistance rendered* (Wallace, direct inter. 9, Record, 98, Answer, 115; Wylie, Record, 142).

The fire was evidently started among gunning sacking lying on the 'tween decks floor, and the smudge of the burning cloth had much to do with the quantity of smoke which passed up into and through the cabin. For some time after the flame was extinguished, in the nature of things, smoke was still coming up through the cabin from the extinguished blaze. It is, of course, common knowledge that wood will smoke after fire in it has been extinguished with water, and this probably accounts for statements made by some of the witnesses as to the length of time the fire burned; on deck, seeing the smoke, they assumed there was still fire below.

Another disinterested witness, who had full and repeated opportunity to know the extent of the fire, is Yeaton, the "Sardhana's" apprentice:

> Q. Was the ceiling or the under part of the deck burned at all?
>
> A. No.
>
> Q. Was the floor of the between decks burned at all?
>
> A. No.
>
> Q. Was the bulwark burned at all other than the door?
>
> A. The bulkhead?
>
> Q. The bulkhead, I mean.
>
> A. No, not that I saw.
>
> Q. How many times did you see that after the fire itself?
>
> A. I should say daily for quite a long time. My work took me down there practically every day.
>
> (Record, 298.)

And again on cross-examination:

> Q. Mr. Yeaton, did you mean to testify that there was no damage whatever to the bulkhead?
>
> A. I never saw it.
>
> Q. I say, do you swear that there was no damage to the bulkhead?
>
> A. It might have been smoked, but I never saw any trace of burning on the bulkhead.
>
> (Id., 304.)

We submit that this evidence is strong and convincing and, coupled with the testimony already referred to of Captains Baird, Wallace and Wylie, and also the testimony of Preece, the boss stevedore, clearly shown to be disinterested, who subsequently unloaded the cargo at the very place of the fire (Record, 283, 285), proves conclusively that the *full extent of the fire* is shown by the batten door in evidence (Baird, 268; Preece, 283, 284; Yeaton, 297, 298).

Appellee relies upon the extended protest of the master, admittedly copied from the ship's log (Wylie, 149), as showing the bulkhead of the ship was burned. Both Captains Wallace and Wylie explained fully and clearly the statements contained in this protest (Wallace, Cross Inter. 7, Record, 104; Answer, 120; Wylie, 150, 151. See also Capt. "Wallace's" letter to his owners dated April 19, 1911, Record, 159, 160), and we submit that their explanations are satisfactory. When the circumstances are considered, under which the signatures of these men were secured to this protest, and when it be considered that it was prepared for use against the appellant in this case *(although it cannot be legally so used, 17 Cyc.*

405, 406),—we believe it will be given heed only as presenting a possible explanation of Surveyor Walker's extravagant statements as to the extent of the fire.

Walker's survey report, in the exact words of the protest (Survey, Record, 22; Protest, 103), contains the statement that the *bulkhead* was burned, and, as this statement was taken from the ship's log (Record, 198, 199), it is altogether possible that the oral testimony of a busy man, such as Mr. Walker undoubtedly is, would be affected, if not entirely controlled, after the length of four or five years, by the statement contained in his survey, even though he states that an independent survey was made. He says:

> I have a strong recollection after reading my reports on that of the fire, yes, I have a good recollection.
>
> (Record, 199.)

And again:

> Q. You have in your experience since then been pretty busy haven't you, making surveys of ships?
>
> A. Yes, busy all the time, practically speaking.
>
> Q. You are not very zealous to retain these little matters of detail in your mind for any considerable time, are you?
>
> A. No, after I report on matters, as a rule they pass from my sight.
>
> Q. You rely on your reports to refresh your memory?
>
> A. Yes, sir, otherwise I would get them mixed.
>
> (Id., 206, 207.)

And right here we call attention to one matter where the witness, because of the lack of a report to assist

his memory, did get "*mixed*". In regard to the method of ascertaining the amount of creosote lost, he says:

> Q. Explain how you arrived at the number of gallons of creosote which were lost.
>
> A. The way we arrived at the loss, we took the invoice number of drums and what each should have contained.
>
> Q. That gave the total number of gallons?
>
> A. Yes, that should have been there. And as the drums were emptied into a tank, an empty tank, and as the drums were emptied the amount was shown by the meter reading.
>
> Q. Were these readings taken under your supervision?
>
> A. Yes, sir.
>
> (Record, 190, 191; see also 214.)

Appellee's superintendent, on cross-examination, says:

> Q. Was any meter used in the measurement of the creosote from the damaged drums?
>
> A. No.
>
> Q. It was simply dumped or poured from the drums into a receptacle known to contain so many gallons and measured in that way?
>
> A. Yes.
>
> (Beal, 75.)

And again:

> Q. Were those full drums measured in the same way that the creosote in the partially damaged drums were measured?
>
> A. Yes.
>
> Q. No meter was used?
>
> A. No.
>
> Q. Have you a meter there for the purpose of measuring creosote?
>
> A. We did not at the time I was there.

Q. You were there and would know if they had one?

A. I would have known it.

(Id., 78, 79.)

In view of all the circumstances, it is evident, that, on the question of the extent of the fire, Walker was testifying, not from a remembrance of his inspection of it, but from the statement embodied in his survey, which statement was copied from the ship's log. If the court takes our view, and holds that a preponderance of the evidence shows that the "Sardhana's" door represents the extent of the fire, then, of course, Walker's further statement, that the repair value of the damage done amounts to one hundred and fifty or two hundred dollars (Record, 206), cannot be credited.

Appellee also relies upon the evidence of F. D. Beal that the bulkhead was burned (Record, 66). It will be seen that this witness is not very positive in his statement as to the extent of the fire. He is, however, positive in his opinion that the fire started in but one place, that is, that there was but one seat of fire (Id., 84); and he makes a rough sketch to illustrate his remembrance of its extent. Bearing in mind that the fire had but one place of origin, if the court compares Beal's exhibit (Id., 96) with the physical evidence as represented by the door itself, it will be apparent that the witness is mistaken in saying that any of the bulkhead was burned. If there was but one seat of fire, the *door clearly shows where it was,* as well as the *impossibility* of its having extended to the bulkhead. If Beal's sketch

illustrates his testimony, the door itself refutes both sketch and testimony as to the fire having reached any part of the batten bulkhead.

The entire situation resolves itself into the following: A fire took place on the "Sardhana" which burned or charred a batten door leading from the 'tween decks into the lazarette, but only to such an extent that it was not considered worth repairing, and never was repaired. Was it within the contemplation of the parties, in view of the law of the Glenlivet case, that such a trivial fire, happening nine days after the voyage of the vessel had been completed, should open the warranty of the F. P. A. clause?

As has been shown in the opening of this brief, under what is agreed to be the law of England, the expression *"burnt"* must be construed in pari materia with the word *"stranded,"* and the words *"stranded, sunk or burnt,"* when used in collocation, require that there should be a substantial burning of the vessel as a whole. However, the claim here is made that, because of this condition of the law, and in order to avoid its effect, the expression was changed from *"burnt"* to *"on fire."* Assuming, therefore, for the purpose of this argument, that such was the fact,—in view of the clear expression of the judges in the Glenlivet case that the exceptive words of the memorandum must be read in collocation with each other,—we reiterate that the purpose sought to be accomplished by the change fails. The change should and could have been made so clear as to leave no ambiguity as to its purpose to override the principle

which had been laid down in the Glenlivet decision. It is one matter to agree that a particular average loss will be paid *if the vessel as a whole is on fire,* but quite a different matter to say that it will be paid if any kind of a fire occurs, even one so trivial as to be considered by the vessel's owners undeserving of repairs, though the cost of such repairs is covered by hull insurance.

We beg to again repeat the opinion of Mr. Gow on this point:

> Since the issue of the (Glenlivet) decision some slips have had the words "on fire" *added* to "burnt", confessedly in the hope and expectation of thus restoring to the assured what has been taken from him by the decision. (Italics ours.)
>
> * * * * * * *
>
> But will not exactly the same principle that was applied in the interpretation of "burnt" be applied to that of "on fire"? For it is not a question of the extent of the effect of ignition * * * as far as the memorandum is concerned, is it not all the same whether you say *"burnt"* or *"on fire"* so long as the principle of "substantial burning of the ship as a whole" is applicable?
>
> (Gow, p. 181.)

It will be noted that Mr. Gow's opinion is based upon slips having the word *"on fire" added to "burnt",* so that the clause reads: *"Warranted free from particular average unless the vessel be stranded, sunk, burnt, on fire, or in collision"* (See Beckett, Record, 232). If, changed to read as above, Mr. Gow's opinion is that the construction would still fall within the principle of the Glenlivet case, then, a fortiori, that principle controls if the word *"burnt"* is omitted, and the clause

reads simply *"on fire"*. Leaving in the word *"burnt"*, and *adding the words "on fire"*, would bear some slight inference that the former exception was intended to be modified by the addition, but when the words "on fire" *substitute* the word "burnt" no such inference is possible, if the principle of the Glenlivet case be adhered to. Nothing could have been easier than for the applicant for insurance to have relieved the situation from all chance of ambiguity by saying to the underwriter: "You pay for a particular average *loss* if the ship be stranded, sunk or on fire, the fire to be of such a character as to work substantial damage to the structural part of the ship." Or, if he wanted even better protection than such a clause could give him, as in the case at bar, he could have added: "The fire to be of any character, whether substantial or trivial", or *"The extent of the fire to be immaterial."*

We find in the very policy sued on, and in the F. P. A. clause, a similar limitation affecting the word *"collision"*: Warranted free from particular average unless the vessel be in collision * * * *"the collision to be of such a character as may reasonably be supposed to have caused or led to damage of cargo."* This particular limitation is in the interest of the *insurer*, but it is submitted that, if the *assured* was seeking an amplification of the *"burnt"* exception of the clause, it was equally incumbent that such intention should be made clear.

In the Glenlivet case the English courts resolved the ambiguity found in the use of the word "burnt" in favor of the underwriter, and held that the ship must have

been *on fire* as a whole, thereby excluding from the meaning of the word *total destruction of the whole.* Is it not, therefore, obvious, in view of the principle laid down, that the expression *"on fire,"* when used alone, should receive the same construction? When the idea of total destruction is excluded from its meaning, the word "burnt" is no more than the past expression of the same fact or idea expressed by the words *"on fire".* In this view, to say that a vessel is burnt means that the vessel *has been* on fire, and nothing more.

From the decision of Judge Hanford in this case on exceptions (184 Fed. 949), as also from Judge Netterer's decision, it is apparent that both overlooked *the narrow meaning* given to the word *"burnt"* by the Glenlivet decision, for otherwise they could not have said that the words *"on fire"* are not synonymous with the word *"burnt".* Judge Hanford, however, is entirely correct in his statement if, to the word "burnt", is given the definition of *total destruction.* However, this decision, given on exceptions, is of little value at this time. It goes no further than would a decision on demurrer at law, and is based upon the uncontradicted, extravagant allegations of the libel, wherein it is alleged that, in addition to the bulkhead and door, *other parts of the ship were burned* (Record, 5).

Before leaving this subject, we wish briefly to comment on the testimony given before the commissioner in this case by Mr. Beckett of Seattle, who is referred to by the trial court as *"an average adjuster of London, England"* (Record, 328). This young man gives testi-

mony on direct examination which runs as smoothly as a well ordered watch. His qualification as an average adjuster consists of a connection with the firm of Johnson & Higgins since September, 1911, and before that for a period not revealed with two English concerns. Based on this experience of unrevealed duration, despite objection of counsel that he is not qualified, the witness proceeds to say that it is the practice of English adjusters to consider the warranty in the F. P. A. clause opened if a structural part of the ship is on fire, and that it does not depend on the extent of the fire at all. When asked as to the number of cases adjusted by him with the F. P. A. clause in the policy, he says it would be impossible to state, but that there have been a considerable number (Record, 229); that never to his knowledge has his view of the matter been contested by underwriters (Id., 229); that to his knowledge the words *"on fire"* were *added* to the policies after the decision in the Glenlivet case in 1893 (Id., 230); and finally, that he considers the warranty open in the present case if the bulkhead door was burned (Id.). At the very beginning of his cross-examination his qualification as an expert receives a rude shock, when it turns out that at the time of the first use of the words *"on fire"*, after the decision in the Glenlivet case in 1893, he was at school, unconnected with average adjusting and knew nothing about the Glenlivet case (Id., 231). By way of apology, however, he says that these matters are covered by text books (Id.). He then testifies that his and Mr. Gow's construction of the expression "on fire", as

contradistinguished from the expression "burnt", are alike, and that Gow agrees with him that the two expressions should be given *different constructions* (Id.). The substance of the witness' testimony may be summed up in the following:

> Q. * * * Do you mean to say that it is the practice that the warranty is opened where any part of the structural part of the ship is on fire, no matter how minute the fire is?
>
> A. To the best of my knowledge and belief, yes.
>
> (Record, 236.)

Testing his own experience in the matter, the most trifling fire with which he has been connected, and where, by the common consent of both the assured and the underwriter, the warranty was opened, occurred in January, 1912, on the ship "Watson", and the fire loss totaled from $700 to $800 (Record, 240, 241). In attempting to test his knowledge of the matter as an expert, aside from personal experience, the witness becomes increasingly unsatisfactory, for he says his knowledge *"is more or less confined to the adjustments I have made", "I have no means of hearing of them"* (referring to trivial fire *losses* which, by common consent of the assured and underwriter, opens the warranty) (Id., 241).

A careful reading of Mr. Beckett's testimony seems clearly to indicate an entire lack of knowledge or experience, which could fairly be held applicable to the facts of the case at bar. The opinion which he expresses, and which he assumes to be in harmony with Mr. Gow's, but

is not, refers to policies where the words "on fire" have not been *substituted* for "burnt", as in the present case, but have been *added* to it.

> Q. That this expression "on fire" in modern policies is substituted for the expression "burned"?
> A. No, it is included that way. "Burned" has not been left out of the clause, but "on fire" has been added.
>
> * * * * *
>
> Q. How would the F. P. A. clause read?
> A. Warranted F. P. A. unless stranded, sunk, burned, on fire or in collision.
>
> (Record, 232.)

Here, then, is the situation: The Glenlivet decision establishes the principle that where the word "burnt" is used in collocation with the word "stranded", then, the ship must be on fire as a whole. This because of the established construction of the meaning of the word "stranded", as formerly used alone in the warranty. If the assured then is looking for a fuller protection than that given by the principle of the Glenlivet decision, it possibly might be successfully contended that such hope and expectation is realized by *adding* to the expression "burnt" the words, "on fire", but when the word "burnt" is not so attempted to be enlarged, but is substituted by words of exact analogy (when the idea of something less than total destruction is intended to be expressed), then, we submit there can be no possible ground for holding that the substituted words, read in collocation with the word "stranded", mean anything more or less than did the word "burnt".

III.

THE CLAIM FOR THE VALUE OF THE FOUR DRUMS LOST AND SALVAGE EXPENSES CANNOT BE SUSTAINED BECAUSE (a) THE LIGHTER IN QUESTION WAS FURNISHED BY THE ASSURED AND WAS UNSEAWORTHY, AND (b) THE ASSURED WAS NEGLIGENT IN LEAVING IT OVER NIGHT ALONGSIDE THE VESSEL, FULLY LOADED AND UNATTENDED.

During the course of discharge, and on the night of Saturday, November 22nd, a fully loaded barge, moored alongside the "Sardhana" (Preece, 278), capsized completely, precipitating its load into the bay. Although appellee's libel is framed to cover the loss of four drums and salvage expenses, as a particular average *loss,* made possible by the fire, and the trial court seems to follow that lead, still, we contend, that appellee's sole ground for recovery of these particular damages rests in the provision of the F. P. A. clause reading: *"Each craft or lighter to be deemed a separate insurance"* (see policy, original, Libelant's Exh. "A", also printed record, 9). Were it not for this clause, and if appellee were confined to the contention shown by the libel that the fire of November 18th deletes the warranty, so as to let in this particular average loss, its case on this claim would be desperate, for the reason that the exception extends to cover only goods on board the ship at the time the fire occurs,—a point which we will take up more fully later on.

In *Thames & Mersey Marine Ins. Co. v. Pitts,* 7 Asp. (N. S.) 302, we find a policy, issued by the appellant in the case at bar, construed, where the question was,

whether the F. P. A. warranty was opened by a *stranding* as to goods not on the vessel at the time of stranding, although at risk under the policy on a lighter, from which they were subsequently loaded on the ship. The policy contained the usual warranty against particular average *losses,* with the exception *"unless the ship or craft be stranded"*. It further contained the clause, *"Each craft * * * to be considered as if separately insured"* (Id. p. 306). Day, J., says:

> "The goods are insured in the craft while in the craft; and they are insured in the ship while in the ship, and not in the craft. To my mind, the insurance while in the craft is covered by the policy, and it is by the policy applicable to the craft, and *all the incidents of the risk, and all the incidents of the insurance are applicable to the craft.* (Italics ours.)
>
> "* * * when the ship was stranded the goods were in the craft and the only stranding for which the underwriters would be responsible would be for stranding in the craft." (Id. 306.)

The trial court cites this case against the appellant (Record, 331), but it is difficult to determine, from the decision, what point its citation is intended to cover. As it was one of the cases on which we depended at the trial, perhaps its use against us was an inadvertence. At any rate, the case, we submit, establishes two or three very material points:

1. That the exceptive words of the F. P. A. warranty only affect goods on board at the time the warranty is opened;

2. That under the terms of the policy in suit the exceptive words of the F. P. A. warranty apply to the lighter *separately,* and that the stranding or sinking or burning, as the case may be, must be of the lighter, and that otherwise the loss of the goods on the lighter must be *total* or there is no liability.

As we have intimated, this latter was not the theory on which appellee's claim is based, but we submit it is clearly the only theory upon which it can recover for the four lost drums and salvage expenses.

The court in the Pitts case, in holding that the contract of insurance was separate as to the goods while on the lighter, very properly says, that *"all the incidents of the risk and all the incidents of the insurance are applicable to the craft".* One of the very material incidents of the contract is the implied warranty of seaworthiness for which we contend. Instead, however, of recognizing the express provision of the policy in suit, making each *craft or lighter a separate insurance,* to which all the incidents of the contract are applicable, the trial court, on the sole authority of *Lane v. Nixon,* an English case decided in 1866, and cited by text books, holds that the implied warranty as to seaworthiness does not extend to lighters.

In *Lane v. Nixon,* decided on demurrer, there is no evidence to show that the policy contained the controlling provision found in the contract in suit, namely: *"Each craft or lighter to be deemed a separate insurance";* therefore, no reason for the construction that *"all the incidents of the insurance"* were applicable to the lighter. Furthermore, it will be seen that the

reason for the rule laid down in this old case is not present in the case at bar. There it was said: "*The owner of the goods has no means of knowing anything about the lighters or other craft to be employed,* * * *"; while here the owner was the receiver of the goods at the place of the termination of the insurer's liability, and received them from the ship's tackles on to the lighters, which it furnished and controlled in the loading and transporting from ship to shore. Appellee's conduct, in having a survey made of the particular lighter in question, is clearly a recognition of its obligation to furnish one fit for the purpose to which it was put.

An American case, cited in the text books on this subject of implied warranty of seaworthiness covering lighters, is the old case of *Van Valkenburgh v. Astor Mutual Ins. Co.*, 1 Bosw. (N. Y.) 61, in which it was held that the assured *could not* recover for losses caused by the unseaworthiness of flat boats used on a portion of the voyage.

In a recent English case, involving a contract of affreightment, where *Lane v. Nixon* was expressly relied on by counsel, the court held squarely that the implied warranty of seaworthiness *did* extend to the lighters used in the course of transshipment of the cargo, and this irrespective of whether the lighters are furnished by the shipper or not, and irrespective of whether the contract of shipment contains the clause that the carriage of the goods in such lighters is to be "*at the risk of the owner of the goods*".

The Galilio, XVIII Com. Cas., Part III, p. 146 (Advance Sheets).

This case, decided in February, 1913, is the last word on the subject and, although it involves a contract of affreightment, we submit, that the implied warranty of seaworthiness in such a contract is no different from that in a policy of marine insurance.

The Vortigern, VIII Asp. M. C. 523.

Before going into the facts, we call the court's attention to the point that, irrespective of the question of an implied warranty of seaworthiness, the appellee cannot recover unless it shows that the lighter capsized because of a peril of the sea, because otherwise the *loss* did not occur through a peril insured against, and the burden of proof on this point lies with appellee.

If we are right in contending that the assured's claim must be based on the separate insurance lighter clause, then, the sole ground on which this lighter liability rests is that the loss, under this separate risk, was (1) total, and (2) caused by a peril insured against. These two facts must be affirmatively shown by appellee, and when this showing has been made then appellant's defenses, which must also be affirmatively shown, are unseaworthiness and/or negligence.

As to the obligation of appellee to show a total loss of the lighter load,—we admit, that, irrespective of the result of the salvage efforts, it has made this showing. As to its obligation to prove that the loss was caused by a peril insured against, we submit that it has failed.

The libel alleges that the barge was *"capsized during a heavy gale"* (Record, 5). With reference to this *allegation,* found on the first page of the average statement

(original exhibit, Libelant's Exh. "M"), it is undoubtedly taken from a copy of superintendent Beal's affidavit incorporated into the average statement at p. 4. Of course, neither the statement in the pleading, nor Mr. Beal's affidavit, is evidence and we, therefore, propose to refer the court to the evidence offered to establish the fact alleged, and necessary of proof, that the loss occurred through the capsizing of the barge during a heavy gale.

Appellee's superintendent, Beal, who was on shore, on direct examination says: "There was a gale that night" (Record, 69). "My recollection is that it was a southeast wind" (Id. 70). Appellee's assistant manager, E. D. Rood, in answering a direct interrogatory, says:

> This lighter was capsized on account of the unusually heavy weather at this time. The seas and swells rolled in and it was impossible for the lighter to weather the storm.
>
> (Record, 135.)

The 17th interrogatory, to which the foregoing is an answer, was so general in its character on this point (Record, 127, 128) that it gave no notice whatever of the answer which it was intended to elicit, and as a consequence no direct interrogatory was directed to meet the undisclosed question of a sea peril. In view of the circumstances we believe the court will give but little weight to the statement, as it must appear from all the evidence in the case, touching the subject, that the witness was not testifying to his own knowledge when he

said, "The seas and swells rolled in and it was impossible for the lighter to weather the storm".

The evidence of Mr. Beal given at Portland, and the evidence of E. D. Rood given at Los Angeles, is the *only* affirmative evidence produced by the appellee to establish that the accident to the lighter was caused by a peril of the sea. On cross-examination of *appellant's* witness, Preece, it is shown that at *Seattle* on the night in question there was "quite a little blow" (Record, 292) (see also cross-examination of appellant's witness, Tuttle, Record, 259).

This is the evidence of the case which is offered to prove a total loss through a peril of the sea; giving to it the fullest possible interpretation, we submit that no loss through a sea peril has been shown. Neither Beal nor Rood were on the "Sardhana" that night, nor on the lighter, and neither of them could have known anything about the conditions as they existed in Eagle Harbor, where the "Sardhana" and lighter were moored. It is not a necessary inference that, because there is wind on shore, or in Seattle, there must have been one on the water at Eagle Harbor, a fortiori, one affecting this lighter lying inshore alongside the "Sardhana", nor is it a necessary inference that the gale, witness Beal speaks of, capsized the lighter. The only witness in the case who occupied a position which would enable him to give evidence of value as to the weather that night was Yeaton, the apprentice, for he alone of those who testified on the subject was on board the vessel, and would have known of any storm or gale or wind, if there had

been any, affecting the lighter. Yeaton knew nothing of any such weather.

This naturally brings us to a consideration of appellant's proof of unseaworthiness.

Were it not for the lower court's decision, we would say that, under the terms of such a policy as the one in suit, the proposition would be elementary that the warranty of seaworthiness extends to the lighter. Judge Netterer, it is true, held that "there is no testimony before the court to establish" unseaworthiness (Record, 330), but such finding being unnecessary, after holding as matter of law that the warranty does not extend to lighters, we conclude it was based on a superficial examination of the record,—no testimony having been taken before the court.

As the contract of affreightment, between the appellee and the carrier, evidently required delivery to be taken at the ship's tackles (Baird, 276), and as the inference to be drawn from the bills of lading, issued by the ship, clearly points to the same thing, and as the appellee undertook the cargo's transportation from ship to shore (Record, 69); it was clearly its duty to furnish only such lighters for this purpose as were reasonably fitted to withstand the ordinary vicissitudes of the place and use to which they were to be put. They must be tight, staunch and strong so that, when loaded, they would safely bear their burdens. They must not only be free from leakage and tight in their seams, when the displacement is light before loading, but also after loading, when the displacement would be greater, and if,

when loaded, they were to be temporarily left over night and used as unattended store houses, they must be fitted so as to withstand such winds or sea as were likely to be expected in Eagle Harbor.

It is our contention, even assuming that the lighter in question did not *seem* to leak when *unloaded,*—as she became submerged by the weight of cargo, the water slowly passed into her hold through newly submerged and leaking seams in her sides (Preece, 290); that the water thus coming in gradually gathered on one side, causing a list that increased during the night to a point where barge and cargo turned turtle. We contend, and the evidence is clear, that in no other way could the barge have capsized, and there could not have been a shifting of the cargo, to cause capsizing, because of the peculiar construction of the drums and the method of loading them.

Witness Preece, the foreman stevedore, loaded the barge on Saturday (Record, 278, 288), and testifies as to the manner in which the drums were placed on the lighter "to keep them from shifting" (Id.). The loading was finished between 4 and 5 o'clock in the afternoon (Record, 279) and, although it was the custom of the creosote company to tow their lighters away from the ship after they were loaded (Id.), on this particular occasion it was not done, but she was left for the night fastened to the vessel's side with the ordinary mooring lines (Id.). The lighter in question was moored and left on the port side of the "Sardhana", and the donkey engine used in unloading the drums from the ship, on the starboard side (Record, 281).

When asked his opinion as to the likelihood of stress of wind or sea capsizing the lighter, Preece says:

> A. If there was sea enough came in there she might capsize, but the way the vessel was lying, and the way the barge was alongside, I don't believe any sea ever came in there that would capsize that barge, provided that there was no water in her, she was not leaking.
>
> (Record, 282.)

On cross-examination the witness testifies that when fully loaded the barge had from a foot to eighteen inches of freeboard (Record, 288), and that when he left her that night she was upright, and on an even keel (Id., 289). When he saw her next she was bottom up and full of water (Id., 290).

As we have stated, the witness who had the most intimate connection with the actual capsizing of the lighter, because he was the only witness on board the "Sardhana" at the time, was Yeaton. He says:

> Q. Do you know when she capsized?
> A. Early in the morning, that is all I know.
> Q. How did you have knowledge of her capsizing?
> A. I heard it go.
> Q. You heard what?
> A. I heard her turn, what I supposed to be her turn.
> Q. What was the noise like?
> A. It sounded to me like drums hitting the ship.
> Q. How long did the noise last?
> A. A few seconds.
> Q. Was the ship in any stress of weather at the time?
> A. Not that I could see, not that I remember.

Q. What kind of a harbor was this where the Sardhana lay—exposed or protected?

A. There is quite a little bay, but it is quite sheltered from the Sound itself, only a narrow entrance.

Q. Was this lighter which was capsized in an exposed or a protected position?

A. Well, from anything coming in from the Sound she was well sheltered.

Q. Was it exposed to anything else, was it exposed to any sea or wind?

A. Just the amount of sea that could get up in the bay, that is in Eagle Harbor.

(Record, 294, 295.)

Cross-Examination:

Q. What was the condition of the weather on the night this scow capsized?

A. I have no particular recollection of it being very bad or very fine.

Q. Have you any particular recollection at all what the weather was. A. No.

Q. You do not remember?

A. No. Had it been bad I should think I would remember it because we probably would have had trouble with our own mooring.

(Id., 308.)

Another disinterested witness whose testimony rebuts the contention of loss from a sea peril, and tends to establish unseaworthiness, is H. C. H. Tuttle, the engineer for the Washington Stevedoring Co., whose barge, with the donkey engine on it, was moored on the starboard side of the "Sardhana". He testifies as follows:

Q. On the occasion of the scow capsizing, did any mishap happen to your scow on which the donkey engine was? A. No, sir.

* * * * * * *

Q. Mr. Tuttle, as the lighter lay on which the creosote was loaded on the occasion when the scow capsized, was that lighter exposed to any wind or sea?

A. You mean the one with the drums on?

Q. Yes.

A. No. It was not exposed near as much as the scow I had. It was out of the weather. The weather had to hit the ship first.

(Record, 248, 249.)

Capt. David Baird, after testifying that the "Sardhana" was anchored from 50 to 100 feet from appellee's dock, and that the donkey engine was moored to the starboard and the lighter to the port side (Record, 264), says:

Q. What can you say with reference to its (Eagle Harbor) situation regarding sea and weather?

A. Oh, it is a landlocked harbor, perfectly safe, I should say.

(Record, 265.)

After testifying to the manner in which the drums were loaded on the scow, he says:

Q. Would it have been possible in your opinion for a scow so loaded to have capsized fore and aft?

A. Impossible.

Q. So that if this scow did capsize it must have capsized athwartships? A. Yes.

Q. In your opinion would it have been possible for this scow to have capsized athwartships through such stress of weather as might have been possible where it lay on the port side of the Sardhana in Eagle Harbor? A. No.

Q. If the scow did capsize what in your opinion then was the cause of its capsizing? A. Water.

Q. Water where? A. In the hold.

Q. You have stated in your opinion it would be impossible for that scow to have capsized athwartships through such weather as might be possible where she lay, through the cause of weather alone or sea, why?

A. Never any sea in there, and besides I suppose the scow could stand up in there until the bottom drops out.

(Record, 266, 267.)

Cross-Examination:

Q. What did you mean, captain, when you stated in answer to counsel in your direct examination that the lighter could not have capsized under any conditions of weather over there?

A. Well, lying alongside the ship she could not.

Q. She could not? A. No.

Q. Under any conditions of weather? A. No.

* * * * *

Q. There is no condition of weather which would cause the ship to have considerable motion over sideways, is there? A. No.

Q. Could not have any motion sideways?

A. Not with that wind.

Q. Not enough to cause this scow to capsize?

A. No..

(Id., 275, 276.)

Appellant's next witness on the subject was Capt. S. B. Gibbs, agent and surveyor for the San Francisco Board of Marine Underwriters. He said that for 11 years he had been going over to Eagle Harbor on the average of about twice a month (Record, 313). He then testifies as follows:

Q. State whether the harbor of Eagle Harbor is protected or unprotected?

A. We look upon it as a protected harbor.

Q. Are there any winds, or is there any sea, that would have affected this lighter as she lay alongside the Sardhana?

A. I do not think she would have been affected by any wind or sea in that position in which the ship was moored, and the barge moored on the inshore side.

Q. Why, captain?

A. Because it is close into land on one side, and the ship on the outside, and the creosote works on the other side, and it seems to me pretty hard for the wind to get up any sea that would affect the barge.

Q. What in your opinion would cause the capsizing of that barge?

A. I should say it must be water in it.

Q. That is, the barge must have had water?

A. The barge must have had water, must have been leaking.

(Record, 313, 314.)

The contention is made that this barge was surveyed by Mr. Walker *after* its capsizing, for the purpose of ascertaining its seaworthiness, and that as a result of such survey Mr. Walker found that the barge did not leak. Our contention is that it is perfectly clear, from Walker's evidence, that the alleged survey was made a number of days after the capsizing, when the barge had been towed to another location, and had been righted and placed on the gridiron. Even had the survey, which was then made, been a proper one, we submit, that the time elapsing between the capsizing and the date of the survey, destroys the value of the survey, in the absence of evidence showing what had been done with the barge in the meantime (see *North American Dredging Co. v. Pacific Mail S. S. Co.*, 185 Fed. at p. 703). However

this may be, it is perfectly clear that Capt. Gibbs' criticism of Mr. Walker's survey is well taken (Record, 155, 156). We give here the evidence of what it consisted, and it should be borne in mind that the evidence refers to *two* alleged surveys,—one made immediately *after* the capsizing, and one made days after that, when the scow was on the gridiron:

> Q. Mr. Walker, what was the condition of this scow at the time you made this examination and survey?
>
> A. I think it says in there (referring to his report) that she was bottom up.
>
> Q. Did you examine to see whether she made any water or leaked?
>
> A. I cannot say, I cannot remember. (Examines Exh. "J"). She was tight. There was nothing the matter with the barge. I examined her afterwards.
>
> Q. She could get no water in her?
>
> A. No, she was not leaking.
>
> Q. When did you examine her, how long after she capsized?
>
> A. I cannot say. I cannot remember exactly. When I examined the barge she was righted up on the gridiron.
>
> (Record, 192, 193.)

Cross-Examination:

> Q. Now, I want to call your attention to your survey of the barge or lighter that was capsized, will you state when it was after the capsizing of the barge, assuming that the capsizing of the barge was on the 21st of November, how long after that was it that you saw the barge yourself?
>
> A. I stated in the report that I examined the barge. I examined the barge the same date.
>
> Q. You examined the barge the same day it was capsized?

A. She was bottom up rather.

Q. Where was she when you examined her?

A. If I remember rightly she was still made fast alongside the ship.

Q. Is that where you made your survey of her?

A. Where I made my first examination of her.

Q. What did that examination consist of?

A. Simply looking at the barge as she lay capsized.

Q. You did not get much information?

A. No, none.

(Record, 207, 208.)

Q. Now, after this first visit to the barge I understand you saw it again?

A. I saw the barge again, yes.

Q. Where was it then?

A. I think the barge was at West Seattle at that time. I would not swear it was.

Q. Was (it) righted when you saw it?

A. The second time, yes.

Q. How long afterwards? A. I could not say.

Q. A number of days? A. I could not say.

Q. What does the report say?

A. I do not pretend to remember five or six years. Yes, the report shows it was some days after. The report covers from November 23rd to December 12th.

Q. So that it was probably around December 12th that you made this further examination?

A. No, I could not say the date of it. I would not attempt to say it.

Q. It was some days after you first saw it?

A. Yes, they towed her away and righted her and she was on the gridiron.

Q. What was the examination and survey you made then, do you remember?

A. Well, I walked around the barge and examined her. There was nothing done to the barge and she was not leaking.

Q. That was the extent of your examination, walking around the barge?

A. That was all that was necessary. There was nothing done to her. She was on the gridiron.

Q. You mean she was out of the water?

A. Yes, sir.

Q. You did not do any corking? (caulking)

A. I did not have anything done at all.

Q. That examination formed the basis of your report?

A. That examination was sufficiently close to be sure of the condition of the barge.

Q. It formed the basis of your report?

A. Yes, sir.

(Id., 212, 213.)

Q. This report upon this damage to the barge, was that made from one inspection that you made of the barge when she was on the gridiron, or from all your inspections at various times?

A. I inspected her when she was bottom up and when she was on the gridiron.

Q. And your report was made from these inspections? A. Yes, sir.

(Id., 220, 221.)

If the record shows that the barge was full of water when she was lying in the bay, bottom up, and this water was not pumped out of her, how can it be explained she had no water in her when Walker inspected her on the gridiron, except that after being placed there, the water in her leaked out?

A careful examination of Mr. Walker's testimony will show that he puts no credence in the contention of *"a heavy gale"* affecting the lighter. It is his opinion that *"the harbor in which the ship and barge were moored is considered perfectly safe and protected from*

wind, but on this occasion an exceptionally heavy ground swell swept in". There is no word in the record to substantiate Mr. Walker's opinion touching a "heavy ground swell", to which he attributes the capsizing, in spite of the fact that his only information on the subject refers to the springing up of *"a heavy gale"*.

We now pass to an examination of the testimony of the last witness on this subject, a witness produced by and testifying on behalf of the appellee, Mr. Fred D. Beal, appellee's former superintendent. Mr. Beal testifies at Portland, and on direct examination says:

> Q. Do you know of your own knowledge what caused the scow to capsize?
>
> A. Yes, I know what caused it to capsize. The real cause of the scow capsizing, it got water in it and the water ran to one side of the scow putting it on an uneven keel, and the weight carried it over.
>
> Q. Did she have water in her the night she capsized before sending her out?
>
> A. No, we examined those scows every night and sounded them for water to see that they were on an even keel.
>
> Q. Did you sound her on this night.
>
> A. Yes, we did every night.
>
> Q. Was there any water in her then?
>
> A. Practically none to speak of. There is always more or less water in the bottom of these scows, but there was no water that we would consider as a dangerous proposition to the scow if she had remained as she was.
>
> Q. How did the water have anything to do with her sinking?
>
> A. Additional water got into the scow during the night.
>
> (Record, 70, 71.)

Cross-Examination:

Q. I presume, Mr. Beal, that your statement with reference to the barge capsizing through filling with water was made because that would be the only means that would capsize the barge? * * *

A. That would be my judgment; that would be the only thing that could capsize the barge—her filling with water.

(Id., 79, 80.)

Redirect Examination.

Q. You testified in answer to one of counsel's questions, or rather he asked you if there was any way for this scow to capsize if she had no water in her. I believe you answered that was your opinion that that was the only way she could capsize.

A. This is my judgment.

Q. Mr. Beal, if this cargo of creosote drums had shifted to one side of the barge, wouldn't that make the barge capsize?

A. That is true, if they shifted to one side.

Q. If the barge collided during this gale with the Sardhana causing the drums to all shift to one side of the barge, would not that probably cause the barge to capsize?

A. Yes, if it were possible for the drums to shift to one side of the scow, that it true.

Q. If water got into the hold of this barge, and she listed to one side, the drums would shift before she capsized wouldn't they?

A. In my judgment, no. I don't think it was possible for the drums to shift on the scow until the scow was in the attitude of capsizing, then they would shift and go over with her.

Q. In the attitude of capsizing, you mean with a heavy list don't you?

A. Yes, when she commenced to capsize she would go all at once.

(Id., 91, 92.)

Q. If the testimony of the stevedores with reference to the loading of this scow was that there were two tiers of drums, with one above the other, would it not be possible for this upper tier to shift in heavy weather?

A. Not in my judgment.

Q. What would prevent the upper tier from shifting if the barge collided with a scow or something else during the night during a heavy swell?

A. The bands on the drums would prevent them from sliding. The whole thing would have to move at once.

Q. If she bumped very severely and took a severe list, would the drums shift?

A. No, I don't think that possible; I don't think it possible for these drums to shift only on the capsizing of the scow.

Q. Only on the capsizing of the scow?

A. No, I don't think it possible.

Q. What do you base your notion on—your opinion on—have you had any experience in loading such as would enable you to give such an opinion on that subject?

A. Yes, I have had a great deal of experience in loading and handling scows.

Q. If this scow was afterwards surveyed by a competent surveyor, and it was found she was perfectly tight and not leaking or making any water, how could you say she could possibly capsize?

* * * * * * *

A. I don't believe it would be possible for that scow to capsize unless she did have water in her.

(Id., 93, 94.)

Summed up, the clear preponderance of the evidence in this case points to the fact that the capsizing of this lighter resulted, not from a peril insured against, but solely from its unseaworthy condition. There was no possibility of the cargo shifting, because of the peculiar

construction of the drums and the manner of their loading. The barge's position on the lee side of the "Sardhana", within a protected nearly landlocked harbor, was peculiarly free from the little wind or sea that was possible, and the fact that the donkey engine's scow, less favorably situated, was unhurt, is all convincing evidence to support the contention that the accident was not caused by stress of weather. The surveys testified to are of no value, while the opinion of such disinterested men as Preece, Baird and Gibbs, called by appellant, and Beal, called by appellee, clearly shows that the capsizing was caused by a slow leak which developed after loading. We submit that the record cannot be said to point to any other reason for the accident. Furthermore, the fact that this barge, seemingly tight, staunch and strong, should, without known cause, capsize under the circumstances, raises in itself a presumption of unseaworthiness.

The Southwark, 191 U. S. 1 (48 L. Ed. 65);
The Arctic Bird, 109 Fed. 167;
The Aggi, 93 Fed. 484, 491;
Dupont Nemours v. Vance, 19 How. 162 (15 L. Ed. 584);
Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 Fed. 912, 920, 921;
Forbes et al. v. Merchants Exp. & Transp. Co., 111 Fed. 796.

Insurance Co. of North America v. North German Lloyd Co., 106 Fed. 973, is a case peculiarly in point on this subject, of a presumption of unseaworthiness, be-

cause it is one involving goods lost from a lighter held to have been unseaworthy, because of capsizing without an apparent cause.

In voyage policies of marine insurance, one of the assured's most important warranties is that of seaworthiness, and in the case at bar this implied warranty applies, for the contract of the parties is *"Each craft or lighter to be deemed a separate insurance"*, and, of course, the further point is obvious that, if the court finds that the capsizing of the barge was not caused by wind or sea, or stress of weather, then there can be no recovery; and on either alternative, therefore, the value of the four drums lost and the salvage expenses are not recoverable, for the reason that in the one case the insurance never attached, and in the other the loss was not occasioned by a peril insured against.

The remaining defense which we make to this claim is that appellee was negligent in leaving this scow unattended by any watchman, after it was loaded. From the fact that this loss occurred on Saturday night, or early Sunday morning, it is apparent that it was the intention of the appellee to leave the lighter where it was until the next Monday morning, although the foreman stevedore, Preece, says that it was appellee's custom to tow the lighters away as soon as they were loaded (Record, 279). If, therefore, it was the intention to leave this fully loaded barge (Preece, 278) moored alongside the "Sardhana" from 5 o'clock Saturday afternoon (Id., 279) until the following Monday morning, where it was subject to heavy gales, *according*

to appellee's contention; then it was gross negligence to have left it unattended. It is one thing for the lighter to be used in receiving and immediately transporting cargo from ship to shore, and it is quite a different thing to use it as an unattended store house in a place subject to heavy weather. *Had it been attended,* the water which got into her hold, whether it came from newly submerged seams or from the deck or hatches, would have been taken care of.

In the course of the cross examination of Walker it was suggested that a leak into the lighter's hold, causing a gradual list, would *necessitate* the capsizing of the barge. His reply is: *"No, that would speak for itself and be looked after by the people in time"* (Record, 211). The witness states an obvious truth, although it is an unfortunate one for appellee. The negligence in using and leaving this lighter, when and where it was used and left, relieves the appellant from liability.

The Galilio, supra.

In view of the law of the Pitts case (supra), holding that all the incidents of marine insurance attach to a lighter, where the policy makes each craft or lighter a separate insurance, and in view of the uncontradicted fact that this lighter was left exposed to whatever weather was possible in the locality where she was moored, and that she was left unattended, and capsized by reason of water getting into the hold; we express our total inability to account for the trial court's opinion that the appellee was not obligated to furnish a lighter fit for the service, and furthermore, that the

record shows no evidence that it was unfit. Our contention of negligence, by reason of the lack of a watchman, it will be noted, is ignored by the court.

We pass now to our next contention as to the damages claimed for short delivery of creosote.

IV.

THE ASSURED CANNOT RECOVER EVEN IF THE SHIP WAS LEGALLY ON FIRE BECAUSE IT HAS PROVEN NO DAMAGES.

(a). It has not shown that any creosote was lost;

(b). If any creosote was lost, it was not on board the ship at the time of the fire, and hence the F. P. A. warranty is inapplicable;

(c). It has not shown how much creosote was lost because of perils insured againsi, it appearing that many of the containers were defective when shipped. The burden of proving the quantum of loss caused by perils insured against has not been even attempted by the assured.

We will take up the discussion of the above three subheadings in order:

(a) *The Appellee Has Not Shown That Any Creosote Was Lost.*

It will be noted that the allegation of the libel on this head is "that the master caused said ship and cargo to be surveyed and it was found that * * * 56267.2 gallons of creosote were found to have been lost" (Rec-

ord, 5). This statement, denied by the answer, remains unproven. No such survey was made by the "Sardhana's" master, and the method by which the alleged loss of 56267.2 gallons of creosote is arrived at is shown, first, in the report of Mr. Walker, where it is said:

> After vessel was discharged the officials of the Creosoting Company emptied the 741 damaged drums and measured the amount obtained from same, which proved to be 23650 galls., and as these drums when full contained 109.2 galls. each, which equals 80917.2 galls., the loss is shown as follows:
>
> 80917.2 gals. when shipped
> 23650 gals. discharged
>
> 56267.2 gals. total loss.
>
> (Record, 22, 23.)

As the evidence shows that the ship was seaworthey in all respects (Wallace 34 cross inter., 111, answer 124) when the voyage commenced, and *"there was no water in the ship nor any leakage of the ship"* (Wylie 31 inter., 147, 148), and as the creosote that had leaked into the limbers *"could not possibly get out of the ship"* (Id.), and as all the creosote was delivered to the appellee which was in the ship at the end of the voyage; we contend that because of these incontrovertible facts there could not possibly have been a loss of creosote. There is no suggestion on the part of appellee that the creosote which entered the ship's hold from the damaged drums *leaked out of the ship.* In fact, the direct positive evidence is that it did not:

> 24th Interrogatory. Was said cargo, or any part thereof, lost during the voyage to the port of Eagle

Harbor, and, if so, state the details of how such loss occurred and the amount of such loss.

Answer. There was no loss.

(Wylie, 145.)

* * * My reason for stating that there were not fifty-six thousand odd gallons of creosote lost is that I was on board the ship the whole time, and I know the creosote was loaded in the ship in London and was delivered in Eagle Harbor to the last drop, bar what we washed off the limbers. No creosote could have gone over the side without my knowledge. There was no water in the ship, nor any leakage of the ship. The creosote that leaked went into the limbers of the ship and could not possibly get out of the ship. There was 13 inches of creosote in the well on arrival at Eagle Harbor. That remained until pumped out as before stated.

(Id., 148.)

(See also Wallace, 27 Inter., Record, 101, Answer, 118.)

The uncontradicted evidence is that none of the creosote, which leaked into the hold of the ship, was pumped overboard during the voyage.

Q. During the voyage from London to Eagle Harbor, was there any creosote pumped out of the hold or limbers of the ship into the sea.

A. None.

(Yeaton, 293.)

In fact, the pumps were not used on the voyage at any time. (Id., 307.) And yet, if there was *loss* of creosote from this seaworthy ship, it must have been pumped out of the hold and thrown overboard.

Walker's testimony makes this necessary conclusion quite clear (Record, 217).

There having been no leakage in the hull of the vessel, and none of the creosote having been pumped out at sea, the next matter for investigation is,—What became of the loose creosote in the "Sardhana's" hold after arrival at Eagle Harbor? The evidence on this point is perfectly clear and uncontradicted:

Q. After arrival at Eagle Harbor, was there any creosote in the hold of the vessel? A. Yes, sir.

Q. How much?

A. I could not tell you for certain, but I believe about a foot.

Q. Did you have anything to do with pumping that creosote out? A. Yes, sir.

Q. What did you have to do? A. Pumped it.

Q. You yourself? A. Personally.

Q. State how much of that creosote was pumped out.

A. The only way I could state was giving you the approximate number of days we pumped.

Q. I don't mean that. Was it all or less than all pumped out?

A. Until the pumps sucked; they would not draw any more.

Q. Was there anything done after that to what remained? A. I could not say for certain.

Q. How many days do you recollect pumping creosote out of the hold? A. At least four.

(Yeaton, 293, 294.)

Q. Where was that pumped to?

A. Into empty barrels on the scow.

Q. Where did these barrels come from?

A. From the creosote company, to the best of my knowledge.

(Id., 294.)

Wylie, the "Sardhana's" mate, answering the 26th direct interrogatory, says:

> The creosote which had leaked out of the drums remained in the ship until it was pumped out by the ship's pump through the hose purchased for the purpose into empty barrels supplied by the Pacific Creosoting Co. We pumped down to three or four inches, until the pumps refused to draw any more, and the remainder was bailed out and passed up in buckets, etc., and poured into the empty barrels. They got every drop it was possible to bail out, and then, of course, we had to wash out. That is all the creosote that was lost.
>
> 27th Interrogatory: State, if you can, approximately how much of said creosote which so leaked out of the drums was lost.
>
> Answer: Nothing, but what we could wash out of the limbers. It is really as much as you could wash off the sides of a cement lined chamber,—infinitesimal.
>
> (Record, 146.)

In answer to the 29th direct interrogatory Capt. Wallace of the "Sardhana" testifies to the same effect (Record, 118), and there is not a word of contradiction to be found in the record. As before intimated, even appellee's witness Walker, confirms it (Record, 215, 216). Both Wallace and Wylie were asked their reasons for stating that the claim of the libel is false in stating that 56,267.2 gallons of creosote were lost (Wylie, 31 Inter., 147, 148; Wallace, 34 Inter., 101, Answer, 119), and Capt. Wallace's reason for so stating is as follows:

> My reason for saying that is that the Pacific Creosoting Company took delivery of the cargo and never made any claims against the ship for dam-

> ages to the cargo, or for shortage; the same as they did in the case of the "Jupiter"; the "Jupiter" was discharging the same time as we were. And further from verbal reports from the manager of the Pacific Creosoting Company's plant at Eagle Harbor, made to myself, that the cargo had burned (turned) out in good condition; also from my own knowledge as to the extent of the leakage and the way in which the creosote came out in the pumps and in the buckets.

This evidence of the report made to Capt. Wallace by the *manager* of the Pacific Creosoting Co. was not contradicted, and finds verification in the fact that no claim was made against the ship for short delivery, as there certainly would have been if fifty-six odd thousand gallons of the creosote had been missing. The evidence seems to point clearly to the conclusion that, at the time the vessel had completed her discharge, there was no thought or suggestion on the part of the receiver of the cargo that there was any shortage, and that the shortage, if any, was discovered long afterwards, and at a time when the entire cargo had been in the possession and control of the appellee for some considerable length of time *unmeasured,* and the loss of 56,267.2 gallons was evidently figured out by Mr. Walker, to whom was furnished the measurement of the *whole* cargo from day to day (Walker, 214, 215).

> Q. The creosote from the barrels went into the general tank with the balance of the creosote, did it?
> A. Yes, sir.
>
> (Id., 216, 217.)

In testifying on the subject of measuring the creosote, appellee's superintendent, on direct examination, says:

> Q. Is that a statement of the contents of the damaged drums? (Referring to Respondent's Exhibit Two.)
>
> A. So far as the number of drums concerned, yes. As to the number of gallons I could not say from the data I have at the present time that that is.
>
> Q. Where would that information be secured —in other words, where would the measurement of the number of gallons be made?
>
> A. They would be made at the Pacific Creosoting Company plant, at Eagle Harbor.
>
> Q. You were the superintendent of that plant at that time, were you? A. I was.
>
> Q. Would these measurements be made under your direction? A. Yes.
>
> (Record, 72, 73.)

Cross-examination:

> Q. When were these damaged drums dumped?
>
> A. Approximately some time between the latter part of December and along up to the first of March. This statement was made on March 8th. We have records of dumping there on the "Sardhana" from December 1st—prior to December 1st. I have a record of 24,572 along the latter part of November and up until March.
>
> (Id., 76.)

> Q. You would not want to say that the drums were measured out much before March 8, 1909?
>
> A. No, not positively, I could not state that.
>
> (Id., 77.)
>
> (See also Walker, 214.)

It will be noted that Mr. Walker's report of survey on the cargo loss of 56,267.2 gallons bears date Seattle,

"November 17th-December 28th, 1908", and contains this statement:

> After vessel was discharged the officials of the Creosoting Company emptied the 741 damaged drums and measured the amount obtained from same, * * *.
>
> (Record, 22.)

This would indicate, that prior to December 28th, 1908, these damaged drums had all been emptied and measured, but we submit that Mr. Beal's testimony, just quoted, refutes any such contention. Furthermore, Mr. Beal's letter to his company, *dated Eagle Harbor, December 26th, 1908, contains this statement:*

> As to the quantity of oil received in this cargo we cannot even hazard a guess, as it is practically impossible to give anything within reach of what she brought.

When this letter (Original, Respondent's Exh. 1) was introduced in evidence, Mr. Stevens, the company's secretary, then under cross-examination, testified as follows:

> Q. Was there any doubt at the time of the receipt of this letter as to the amount of creosote which had been received in this cargo?
>
> A. The exact quantity, yes; the exact number of gallons.
>
> Q. Was that uncertain quantity ever cleared up? A. Yes, sir.
>
> Q. Where is the result of that clearing up?
>
> (Witness hands counsel paper.)
>
> Q. You are referring now to another paper, a yellow sheet of paper, dated March 8th, 1909?
>
> A. Yes, sir.

(Paper introduced in evidence and marked Respondent's Exhibit No. 2.)

Q. This last sheet introduced in evidence purports, does it not, Mr. Stevens, to be the result of measuring the creosote left in the damaged drums of the "Sardhana", and nothing more?

A. That is all.

(Record, 180, 181.)

Q. This exhibit 2 is from the files of your office? A. Yes, sir.

(Id., 182.)

On redirect examination the witness was asked when this creosote was measured, and answered:

A. 1908 or 1909. Latter part of 1908 and the first part of 1909.

(Id., 184.)

Bearing in mind that Mr. Walker's survey, which purports to set forth the loss of 56,267.2 gallons, ascertained as the result of measuring by meter the contents of the damaged drums, a process which he says was carried on under his personal supervision, was dated *December 28th, 1908;* it is interesting to note that Mr. Beal says: "I don't think he personally measured the oil that came out of these particular drums." (Record, 73), but that his information on the subject was derived from the statement dated March 8th, 1909, and marked Respondent's Exhibit 2.

Q. You furnished Mr. Walker with copies of your reports, didn't you?

A. Yes, I believe this is a copy of the record we furnished him.

Q. You are now referring to Respondent's Exhibit Two?

> A. Yes, that is my recollection that this is a copy of the report given him, and is compiled or was compiled from our record and figures.
>
> (Beal, 74.)

This evidence is of importance as showing, beyond question, that the figures contained in Mr. Walker's report of December 28th, 1908, showing the claimed shortage of 56,267.2 gallons were compiled before the leaky drums had been measured, and for that reason, are unreliable and worthless. The report is also unreliable in that it does not purport to set forth the number of gallons of loose creosote which were pumped from the hold of the "Sardhana" and delivered to the appellee. Walker says there was a small quantity pumped out and dumped into this same tank (referring to the tank into which the creosote from the damaged drums was measured). He also says that the exact amount of this creosote he cannot tell, and then adds: "*Three or four thousand gallons. * * * that is about what we estimated it.*" (Record, 217.) Mr. Beal says he has no independent recollection of the number of gallons of loose creosote pumped from the hold of the ship (Record, 75), but from his records he is able to locate about 4200 gallons:

> * * * about 4200; whether there are more that came from the "Sardhana", I can't just now state. There are some other notations there, but it is not stated specifically.
>
> (Record, 75.)

The whole matter, we submit, resolves itself into this situation: The loose creosote in the bottom of the

vessel was all turned over to the appellee, together with the drums from which it had leaked. These latter, *partially filled,* were taken to the yard of the appellee, where they remained, in their leaking condition, until emptied some time in March, 1909, and the reason for not measuring their contents sooner, is suggested by the evidence:

> Q. Where were these drums during all this period, from the date of their discharge up to March 8, 1909?
>
> A. They were on the ground near our dumping plant at Eagle Harbor in the yards.
>
> Q. Do you know why they were not measured sooner than that?
>
> A. My recollection was that our storage capacity in the tanks was pretty well taken and we only dumped the drums as we had room in the tanks for them.
>
> * * * * * * *
>
> Q. Do you remember when you measured the full drums?
>
> A. My notations here on the figures extend from that time over into May, 1908—May 13th, 1909, is the last one I have.
>
> (Beal, Record, 77, 78.)

Under these most remarkable circumstances, appellee is attempting to hold appellant to a liability for a loss, *which the record does not show existed at the period of time at which all liability ceased under the policy,*— a loss which occurred, in an unascertained part at least, while the drums were lying, in their leaky condition, for six or eight weeks, on the ground in the yards of the appellee. We submit that, under such circumstances, neither in law or equity can appellant be held respon-

sible for the loss, even if it be conceded that there was one.

This brings us to our next point.

(b) *If Any Creosote Was Lost it Was Not on Board the Ship at the Time of the Fire and Hence the F. P. A. Warranty is Inapplicable.*

If Walker's compilation, showing a shortage of 56,267.2 gallons, be accepted without contradiction, it was obviously brought about by wantonly pumping the loose creosote from the hold of the ship into the sea, or in some other inexplicable way, *before the fire took place.* It is well settled, however, that in order to recover under the F. P. A. warranty, it must be shown that, *at the time of the fire,* the goods were at risk *on the ship.*

26 Cyc., 683;
2 Arnould Marine Insurance, § 887;
2 Phillips Insurance, § 1762;
Gow, Mar. Ins., p. 178;
Roux v. Salvador, 1 Bing. N. C. 526;
Thames & Mersey M. I. Co. v. Pitts, 7 Asp. 302;
The Alsace Lorraine, Id., 362.

It is undoubtedly true, as held in *London Assurance Co. v. Companhia de Moagens,* 167 U. S. 149, and numerous other cases, that the event mentioned in the memorandum need not be *the cause* of the loss, but the memorandum clearly is not opened as to *any* goods not on board when the event took place. Thus in The Alsace Lorraine, supra, a part of a cargo of rice, duly insured, was *jettisoned* owing to severe weather. The

ship then put into Mauritius for repairs, where part of the remaining rice was sold and part held in port for reshipment after the repairs were completed. While being repaired, the vessel stranded. The court held that as the stranding occurred when the goods were *not on board the vessel,* the F. P. A. warranty remained good and the insurers were not liable. In *Thames & Mersey M. I. Co. v. Pitts, supra* (already referred to in another connection), cargoes of maize were insured. One cargo was shipped at San Nicholas and the other was in lighters at Buenos Ayres awaiting shipment,—the policy, however, covering all risk in craft and hence such lighter loads at Buenos Ayres. The vessel stranded while on her way down the river to Buenos Ayres. The court held that, as this latter cargo was not *on the ship* at the time of the stranding, the F. P. A. warranty was not deleted as to it and the insurer was not liable. These two cases make it clearly apparent that the appellant is not liable for the loss of any creosote on the voyage, nor for damage to any drums unloaded before the fire.

Although the trial court recognizes in its decision that this is one of our contentions (Record, 327), and although appellee's libel recognizes the principle by alleging that the fire took place *before* the discharge of the cargo (Record, 5); no further reference is made to it or to the authorities cited in its support, except the citation of the Pitts case at the end of the decision,—a citation exactly contrary to the ruling it is cited to support. It is also to be remembered that the

principle contended for, but wholly ignored, is applicable also to the 427 drums discharged, and in the possession of appellee, before the fire occurred.

If appellant could have established that over fifty thousand gallons of creosote were pumped from the hold of a seaworthy ship into the sea, without necessity therefor, its recourse would properly seem to be against the ship for unlawful conversion, or short delivery, and not against this appellant. In fact, appellee's case on this claim, as well as the court's decision, seems to proceed on the theory of a relation existing between the carrier and itself, under the contract of affreightment, rather than on the contractual obligations created under a total loss policy of insurance with an F. P. A. clause.

This point has needed but brief treatment, yet we submit that it is conclusive, and relieves appellant from the payment of most of the damages claimed.

Our next point can also be briefly discussed:

(c) *The Appellee Has Not Shown How Much Creosote Was Lost Because of Perils Insured Against, it Appearing that Many of the Containers Were Defective When Shipped. The Burden to Show the Quantum of Loss Caused by Perils Insured Against Has Not Been Even Attempted by the Assured.*

The only consideration given to this contention by the trial court, is to be found in its reference to the master's statement as to the *apparent* condition of the

drums when received on the ship, and the application of the principle, governing the statement, found in the bill of lading: *"Shipped in good order and well conditioned"*. It will be seen, that the question now under discussion does not relate to any implied warranty that the goods shipped are seaworthy for the voyage, as is intimated by the trial court (Record, 331), but solely to the question of *appellee's* obligation to show the *quantum* of loss caused by perils insured against.

Of course, it will be conceded, that the opening of the F. P. A. warranty only admits liability for partial loss *caused by perils insured against,* and where there are losses from perils *not insured* against, as well as from perils that are, it is unquestionably the law that the burden is upon the assured to show the quantum of loss caused by the latter. So that, as the assured in this case has made no attempt at a segregation of losses, if it appears some of the creosote drums were defective, and there was a leakage therefrom *before* the vessel encountered any of the perils insured against; then there can be no recovery. We submit, that the uncontradicted and sole evidence in this case, points conclusively to the fact that there was a leakage from defective drums into the hold of the ship before a peril of the sea was encountered.

Capt. Wallace, in answer to the 35th direct interrogatory (Record, 102), testifies as follows:

> A. I can say that I think that part of the leakage was due to the drums not being strong enough, because we observed creosote in the limbers before

we cleared the English Channel, so that all the leakage wasn't due to the drums that were damaged on the passage. As matter of fact I had rejected quite a number of drums in London of this same shipment, and all the drums were of the same general character.

(Record, 119.)

Wylie, the "Sardhana's" mate, in answering cross interrogatory 26 (Record, 157), says:

Answer: The creosote escaped into the hold of the vessel partly on account of the severe weather and partly on account of the original weakness of the drums, and the leakage of creosote was to some extent due to the screw bungs working out.

(Record, 157, 158.)

In answer to cross interrogatory 32 (Record, 110), Capt. Wallace says:

A. Some of it did; not all of it. We knew that there was creosote in the limbers before we encountered any bad weather at all; the entry of June 9th covers that.

(Id., 124.)

The witness evidently referred to the log entry of June 6th and not June 9th, for the entry of the former date reads:

June 6th: When it was discovered that the carpenter's sounding rod was very slightly colored with creosote.

(Record, 13.)

Capt. Wallace also in answering the 26th cross interrogatory (Record, 111), says:

A. The damage to the drums was due to the bad weather encountered, except such of the drums

as were inherently defective, and permitted the leakage which we found before the rough weather came on; there was no loss of drums.

(Id., 124.)

In answering the same question on cross-examination Wylie says:

Answer: There was no loss of drums or creosote; the damage done to the drums was partly on account of the severe weather and partly on account of the original weakness of the drums. The leakage of creosote was to some extent due to the screw bungs working out as well as to the weakness of the drums and the severe weather.

(Record, 158.)

We submit that this is all the evidence in the record on the question of how the loss from the drums, through leakage, was caused, and it convincingly shows that there was a partial loss through perils insured against and a partial loss through perils not insured against. Furthermore, when coupled with the foregoing evidence, showing the receipt of defective drums, and a leakage from them before encountering any sea peril, we have the extended protest showing the discovery of loose creosote in the vessel's hold seven days after sailing; we submit that the testimony establishes a situation that precludes recovery, unless appellee can show the quantum of loss of loose creosote caused by a peril insured against. This it has not even attempted.

In *26 Cyc.*, 726, it is said:

"The burden is upon plaintiff to show the extent of the loss; and where it appears that the property has sustained damage from perils insured against

and from perils not insured against, it is incumbent on the insured to distinguish the losses occasioned by the several perils."

In *Heebner v. Eagle Ins. Co.,* 10 Gray 131, the policy exempted the insurers from loss caused by breakage of machinery unless occasioned by stranding. Losses occurred on the voyage both by perils of the sea and by stranding, and it was held that plaintiff could only recover for the loss which it could "*definitely*" show was due to the stranding (see p. 143), although plaintiff claimed that this required an impossibility.

In *Paddock v. Com. Ins. Co.,* 104 Mass. 521, there was a provision in the policy that the insurers should not be liable for a partial loss unless it should amount to five per cent. Partial losses amounting to slightly over ten per cent occurred from two gales. It was held that the burden of proof was on the insured to show a partial loss of five per cent from each gale, and, as the assured was unable to segregate the damages caused, it was allowed only one recovery of five per cent, and this only on the theory that at least one of the gales must have caused this much damage (see p. 535).

The Supreme Court lays down a similar principle, though as to a different subject matter, in *Marcardier v. Chesapeake Ins. Co.,* 8 Cranch 39; 3 L. Ed. 481; 484; as does also this court in *Soelberg v. W. Assurance Co.,* 119 Fed. 23, 31, 33, the court there saying:

"There must be some testimony on which a jury could act in fixing the amount of damages. There

being none, the court did not err in directing the jury to find for defendants."

See also,

Bachelder v. Ins. Co., 30 Fed. 459, 461.

We now discuss our concluding point on the subject of the *damaged drums:*

V.

THE ASSURED HAS NOT EVEN ATTEMPTED TO PROVE THE NUMBER OF DAMAGED DRUMS WHICH WERE ON THE SHIP AT THE TIME OF THE FIRE, NOR THE NUMBER WHICH WERE DEFECTIVE AND LEAKING BEFORE THE VESSEL ENCOUNTERED ANY OF THE PERILS INSURED AGAINST.

This subject can be briefly disposed of because it involves evidence and principles of law already referred to in our discussion of the question of damages applying to the loose creosote.

The only evidence in the case showing the number of drums discharged from the ship, prior to the fire, is found in the extended protest. This shows that the vessel commenced discharging on November 17th, on which day 136 drums were unloaded (Record, 17). On November 18th, up to 5 P. M., when the day's work was finished, 291 further drums were discharged (Id.). As the fire occurred somewhere around 9 o'clock that night, it is evident that, before the fire, there had been discharged 427 drums. As appellee offers absolutely no proof as to how many of these drums, which were thus discharged before the fire, were damaged,

the court will be compelled to hold that they all were, and that, therefore, there can be no recovery for *them,* even though it be held that the fire opened the F. P. A. warranty. Furthermore, in the average statement (Record, 16), we find that the protest under date of September 4th says: *"the drums were found to be adrift and were rolling about in all directions".* Of course, these drums, in order to be seen adrift, could only be in the top tiers, and it is a reasonable presumption that these top tiers were discharged first.

Assuming for the present discussion that there were ~~was~~ 741 damaged drums in all, the failure of appellee, just stated, leaves a possible 314 drums on the vessel at the time of the fire. As to these, we submit there can be no recovery because of the additional failure of proof, which would show the number of these damaged by perils insured against, as distinguished from the number, which the evidence shows, were inherently defective when shipped, and leaked before the ship encountered any of the perils insured against. As to the contention of appellee that the *total number* of defective drums was 741, we simply call the court's attention to the evidence of the witness, Wylie, that he tallied the damaged drums as they came from the vessel, and, although he is unable at this time to give the exact number, still, he is certain, they did not equal 741 (Inter. 30 and 31; Record, 147, 148). This inability of appellant to do more than secure this general denial of appellee's claim, as to the number of drums which were damaged, is but one of many examples of the disadvantage to which the appellant is sub-

jected through the long delay of appellee in bringing its suit.

It will be noted that the further claim is made, that *"four additional drums filled with creosote were also found to be lost"* (Libel, Record, 5), these being *exclusive* of the four drums lost from the lighter, and that the average statement *includes* these four drums in the claimed total liability of appellant (Record, 24). As to these four drums, there can certainly be no recovery for the reason that the record contains no proof of their loss through any of the perils insured against. In fact, as to them, the proof is ominously silent.

Before closing we cannot let pass unchallenged the allegation of the libel, that *"a general average adjustment was made, of which the respondents had notice"* (Libel, par. 5; Record, 6). There is absolutely no proof in the case to show that appellant had notice of the average adjustment. The adjustment is, however, obviously not evidence against the appellant as to the amount of damages, and we believe that we have shown that it was based on erroneous data.

In conclusion we submit that appellee has not shown that the "Sardhana" was on fire, and hence has not brought itself within the F. P. A. clause of the policy. If our contention as to this be not sustained, we think it clear that no damages have been proved, except as to the drums lost on the lighter and the salvage charges, which last losses are not recoverable, both because of appellee's negligence and the unseaworthiness of the lighter. We also submit that this belated suit

should not find favor with the court. Brought long after the fire in question occurred, appellant has been forced to an expense in defending the same which will equal, if not exceed, the amount involved. This is plain from the record. It would have been easier for appellant to have paid this loss, but we believe that, if the record does not show that the suit was an afterthought, it clearly shows that appellee has grossly exaggerated its damages, and appellant could not have paid the claim without stultifying itself and inviting similar impositions in the future.

We submit that the judgment of the lower court should be reversed with costs.

Dated, San Francisco,
October 7, 1914.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant.